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2008 SEP 10 PM 12:03

CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

BY _____

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Attorneys for Plaintiff Modavox, Inc., a Delaware Corporation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MODAVOX, INC., a Delaware
corporation,

Plaintiff,

v.

AOL LLC, a Delaware Limited
Liability Company,

Defendant.

CASE NO. **CV08-05914**

COMPLAINT FOR:

1. Trademark Infringement — 15 U.S.C.
§1114, along with request for injunctive
relief;

2. Trademark Infringement, Unfair
Competition, and False Designation of
Origin — 15 U.S.C. §1125(a), along with
request for injunctive relief;

[DEMAND FOR JURY TRIAL]

COMPLAINT

SHAUB & WILLIAMS LLP
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LOS ANGELES, CA 90025
(310) 826-6678 FAX (310) 826-8042
LAWFIRM@SW-LAW.COM

1 Plaintiff, Modavox, Inc. ("MODAVOX"), by and through its above-
2 referenced attorneys, hereby complains and alleges as follows:

3 **NATURE OF THE ACTION AND THE PARTIES**

4 1. This is an action against Defendant AOL for trademark infringement
5 in connection with AOL's use of THE BOOMBOX designation, which is
6 confusingly similar to Plaintiff MODAVOX's BOOMBOX RADIO Trademark, in
7 violation of Lanham Act, 15 U.S.C. §§ 1050-1127.

8 2. Plaintiff MODAVOX is, and at all times mentioned herein was, a
9 corporation organized under the laws of Delaware, with its principal place of
10 business in Phoenix, Arizona.

11 3. Upon information and belief, Defendant AOL, LLC is, and at all times
12 mentioned herein was, a limited liability corporation organized under the laws of
13 Delaware, with its principal place of business in New York City, New York.

14 **JURISDICTION AND VENUE**

15 4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §
16 1338 and 15 U.S.C. § 1121 because this suit arises under the Lanham Act, 15
17 U.S.C. § 1051 et seq. as well as pendent jurisdiction over any state law claims
18 asserted herein pursuant to 28 U.S.C. § 1367(a).

19 5. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and
20 (c) because AOL, LLC engages in business dealings in this district, it provides
21 interactive websites within this district, and solicits contributions and memberships
22 in this district.

23 **GENERAL ALLEGATIONS**

24 6. Plaintiff is in the business of providing, licensing and selling internet
25 video and radio software and services featuring its patented technology under its
26 "BOOMBOX RADIO" mark (hereafter "the Mark").

27 7. Since early 1998, SurfNet Media Group, Inc. ("SurfNet")
28

1 began developing the technology to offer web-based entertainment software and
2 services, and the company actively started marketing under the designation,
3 Boombox Radio, in April 1998.

4 8. The original registrant SurfNet is a predecessor in interest of
5 MODAVOX.

6 9. Plaintiff's Mark was registered with the United States Patent and
7 Trademark Office on June 7, 1999, USPTO Registration 2397385.

8 10. Plaintiff owns the registered Mark, which is and continues to be in full
9 force and effect.

10 11. Plaintiff and its predecessor have used the Mark continuously since
11 1998 to identify their and their partners' websites, offering entertainment services
12 featuring movies, news, talkshows, video and computer games, movies, and
13 television shows. As a result of use and promotion, Plaintiff's mark acquired a
14 favorable reputation to consumers as an identifier and symbol of Plaintiff's product
15 and services.

16 12. Plaintiff is informed and believes, and thereon alleges, that Defendant,
17 willfully and deliberately used and is using the Mark with notice of Plaintiff's
18 ownership of the Mark and began to use the name "BOOMBOX" well after
19 Plaintiff's Mark had been registered to offer virtually identical services as Plaintiff
20 has offered and registered under the Mark.

21 13. Defendant's use of the name "BOOMBOX" is without Plaintiff's
22 consent.

23 14. Plaintiff has advised Defendant of Plaintiff's ownership of the Mark
24 "BOOMBOX RADIO" and the registration and requested Defendant to cease and
25 desist from further use of the name "BOOMBOX" as either a trade name or a
26 trademark. Defendant has failed and refused, and continues to fail and refuse, to
27 comply with Plaintiff's request.
28

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FIRST CAUSE OF ACTION

(Trademark Infringement under 15 U.S.C. § 1114, et seq.)

(Against All Defendants)

15. Plaintiff incorporates and realleges paragraphs 1 through 14 as though fully set forth herein.

16. Plaintiff and its predecessors in interest have used the Mark since April 1998 to identify their products and services, and have been displaying the Mark on webpages, software, and other venues associated with its product and services.

17. Defendant's use of Plaintiff's Mark on its website offering virtually identical services has already and is likely to cause confusion, mistake, and/or to deceive the public as to the origin of Defendants' services and therefore constitute of Plaintiff's federally registered trademark under the Lanham Act, 15 U.S.C. § 1114(a).

18. Furthermore, Defendant's use of the term "BOOMBOX" is likely to cause others to believe there is or attribute a relationship between AOL and Modavox, where there is none.

19. Defendant's wrongful acts will permit Defendant to capitalize on the strength of Plaintiff's success, goodwill, and reputation in promoting its own services under a name which is virtually identical.

20. Defendant AOL has knowledge of Plaintiff's trademark rights, and continues to use its infringing mark to cause confusion, mistake, and deception, in violation and in disregard of Plaintiff's trademark.

21. As a proximate result of the above-alleged acts of trademark infringement, and as a proximate result of confusion and deception caused by Defendant's use of the name "BOOMBOX" for its website, Plaintiff has been deprived of substantial sales, and has been deprived of the value of its trademark as

1 a commercial asset. Plaintiff has incurred, and will continue to incur, substantial
2 damages and harm, including, but not limited to, sales and profits Plaintiff would
3 have made but for Defendant's act, the exact amount of which is difficult to
4 calculate, and presently unknown, but will be established according to proof at trial.

5 22. Defendant's wrongful conduct, unless and until enjoined and
6 restrained by order of this court, will cause great and irreparable injury to Plaintiff.

7 23. Plaintiff has no adequate remedy at law for the injuries currently being
8 suffered and that are threatened in that it will be impossible for Plaintiff to
9 determine the precise amount of damages that he will suffer if Defendant's conduct
10 is not restrained.

11 **SECOND CAUSE OF ACTION**

12 **(Trademark Infringement, Unfair Competition, and False Designation of** 13 **Origin — 15 U.S.C. § 1125(a)**

14 **(Against All Defendants)**

15 24. Plaintiff incorporates and realleges paragraphs 1 through 23 as though
16 fully set forth herein.

17 25. Defendant's acts, as alleged herein constitute, among other things,
18 false designations of origin, false or misleading descriptions of fact, or false or
19 misleading representations of fact which are likely to cause confusion or mistake,
20 or to deceive the public as to the origin, sponsorship, association or approval by
21 Plaintiff of the goods and services of Defendant.

22 26. As a result, members of the public will reasonably be deceived and/or
23 confused into believing that Defendant's products and services are actually
24 Plaintiff's products and services.

25 27. By engaging in the wrongful conduct described herein and above,
26 Defendant has violated section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) for
27 trademark infringement, unfair competition and false designation of origin.
28

1 Because Defendant has engaged in the conduct described herein with fraudulent
 2 intent, and with the actual knowledge of the harm being caused to Plaintiff by such
 3 wrongful conduct/acts, this is an exceptional case, which merits an award of treble
 4 damages and attorneys' fees against Defendant.

5 28. Defendant's acts and conduct have caused and will continue to cause
 6 Plaintiff great and irreparable injury that cannot be adequately compensated or
 7 measured in damages. Plaintiff has no adequate remedy at law and will suffer
 8 immediate and irreparable loss, damage and injury unless Defendant is restrained
 9 and enjoined from continuing to engage in such wrongful conduct.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff prays for judgment against AOL, LLC on all causes
 12 of action as follows:

13 **ON ALL CAUSES OF ACTION**

14 1. That this Court issue a permanent injunction restraining, prohibiting
 15 and enjoining AOL and its agents, employees and any person in active concert or
 16 participation with AOL, from infringing the mark and/or engaging in further such
 17 unlawful acts;

18 2. For all of defendant's profits derived from its infringement of
 19 Plaintiff's trademark;

20 3. For three times the amount of plaintiff's actual damages caused by
 21 defendant's infringement of Plaintiff's trademark;

22 4. For costs of suit incurred herein;

23 5. For Plaintiff's reasonable attorney's fees expended in this action,


24 ///

25 ///

1 6. That this Court afford Plaintiff such other and further relief as the
2 Court deems equitable and just.

3
4 Dated: September 9, 2008

By:



Lisbeth Bosshart,
Stephen D. Morgan,
Attorneys for Plaintiff

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DEMAND FOR JURY TRIAL

Plaintiff MODAVOX, INC. hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

September 9, 2008

SHAUB & WILLIAMS, LLP

By: 

Lisbeth Bosshart,
Stephen D. Morgan,
Attorneys for Plaintiff,
MODAVOX, INC.

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Modavox, Inc. a Delaware corporation

PLAINTIFF(S)

v.

AOL LLC, a Delaware Limited Liability Company

DEFENDANT(S).

CASE NUMBER

CV08-05914 SJO PJWx

SUMMONS

TO: DEFENDANT(S): AOL LLC

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☒ complaint ☐ _____ amended complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Stephen D. Morgan, whose address is Shaub & Williams LLP, 12121 Wilshire Blvd., Suite 205, Los Angeles, CA 90025. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: SEP 10 2008

By: Natalie Gonzalez
Deputy Clerk

(Seal of the Court)

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

I (a) PLAINTIFFS (Check box if you are representing yourself <input type="checkbox"/> Modavox, Inc., a Delaware corporation	DEFENDANTS AOL LLC, a Delaware Limited Liability Company
(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.) David R. Shaub, Lisbeth Bosshart, Stephen D. Morgan, Shaub & Williams LLP, 12121 Wilshire Blvd., Ste. 205, Los Angeles, CA 90025 (310) 826-6678	Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.) <input type="checkbox"/> 1 U.S. Government Plaintiff <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.) <table style="width:100%; border: none;"> <tr> <td style="width:35%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:35%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td align="center"><input type="checkbox"/> 1</td> <td align="center"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business in this State</td> <td align="center"><input type="checkbox"/> 4</td> <td align="center"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td align="center"><input type="checkbox"/> 2</td> <td align="center"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td align="center"><input type="checkbox"/> 5</td> <td align="center"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td align="center"><input type="checkbox"/> 3</td> <td align="center"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td align="center"><input type="checkbox"/> 6</td> <td align="center"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. ORIGIN (Place an X in one box only.)

☒ 1 Original Proceeding
 ☐ 2 Removed from State Court
 ☐ 3 Remanded from Appellate Court
 ☐ 4 Reinstated or Reopened
 ☐ 5 Transferred from another district (specify):
 ☐ 6 Multi-District Litigation
 ☐ 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: ☒ Yes ☐ No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: ☐ Yes ☒ No
 MONEY DEMANDED IN COMPLAINT: \$ amount to be determined, but in excess of jurisdictional minimum amount

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
 15 U.S.C. §§ 1114, 1125(a), Action for Trademark Infringement, Unfair Competition, and False Designation of Origin

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	TORTS PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal <input type="checkbox"/> 385 Property Damage <input type="checkbox"/> 385 Property Damage Product Liability BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 Habeas Corpus <input type="checkbox"/> 535 General <input type="checkbox"/> 540 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition FORFEITURE / PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
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FOR OFFICE USE ONLY: Case Number: CV08-05914

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? ☒ No ☐ Yes

If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? ☒ No ☐ Yes

If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or
☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or
☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

- (a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.
☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Delaware, Arizona

- (b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.
☐ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Delaware, New York

- (c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.

Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

Note: In land condemnation cases, use the location of the tract of land involved.

X. SIGNATURE OF ATTORNEY (OR PRO PER):  Date September 09, 2008

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))